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IN THE

Supreme Court of the United States

October Term, 1944

No. 183

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,
v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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The argument in opposition to this petition rests upon a misconception of the record.

In its recital of the occurrences just preceding the arrest of the defendants, the Government's brief (p. 4) reads:

"Petitioner Marino then opened the rear door, looked up, and seeing the agents' car, glanced at petitioner Vigorito and slammed the door shut (R. 11, 22)."

There is in this statement the assumption that the petitioners saw the agents' car, and the implication that they recognized it as such, and hastily shut the door of their own car. The testimony supports neither the assumption nor the suggested inference.

Agent Jedrey testified (R. 11) that petitioner Marino opened the rear door of his car, and looked in the direction of the corner where the agents' car stood. The witness was careful to correct his inadvertent statement that the petitioner "looked toward us", changing it immediately to "looked toward the corner where we were parked".

The other agent who testified, said nothing about either petitioner opening the rear door. He said merely that " * * * two men got out of the car. They looked back at us and closed the door again * * * " (R. 22).

This false assumption goes to the heart of the Government's argument that petitioners' actions were inconsistent with innocence.

Moreover, this incident has been the subject of misstatement and unfounded inference throughout the history of the case. The Trial Judge put to the jury the questions whether the petitioners knew the agents, and whether they closed the door after seeing them, and then reopened it and removed the alcohol after the agents had passed by, and, finally, whether those were the actions of innocent men, or of men who had something to conceal (R. 54).

In the Circuit Court of Appeals, there was disagreement on the question whether the Trial Court's comment prejudicially added to the evidence (R. 85). The judges who thought it did not, came to that conclusion "in view of the evidence to the effect that defendants discontinued removal of the carton from the car until they thought the agents had ceased to observe them" (R. 85). There is no such evidence. The fault in these convictions is that there is no evidence to support them.

The discussion of this question, in a footnote to the Government's brief (p. 13, n. 8), concedes that there was no evidence "that the petitioners actually knew that the men who were observing them were government agents"; but like the opinion below, it fails to recognize the fact that there was no evidence that the petitioners knew that

anyone was observing them, nor even that the petitioners saw the agents or their car.

Another misleading statement results from an obvious typographical error in the record, not heretofore noticed. Petitioner Marino is quoted as replying "Nothing" when he was asked by a Government agent what was in the package (Govt. Br. 5).

Inspection of the record makes it clear that the agent testified "and Marino said nothing", i. e., made no reply (R. 22). A few sentences later, the same witness said "so Marino continued to be silent" (R. 22). The other agent testified that he heard the question asked, and that he did not hear any answer from Marino (R. 12).

The other matters to which the Government points as indicative of guilty possession are scarcely enough even to arouse suspicion.

The Circuit Court of Appeals for the Second Circuit rejects the doctrine that a conviction based upon circumstantial evidence should be reversed unless the circumstances are inconsistent with any reasonable theory of innocence (*U. S. v. Mule*, 141 F. (2d) 487, 488; *U. S. v. Valenti*, 134 F. (2d) 362, 364). Consistent with that rejection, it affirmed the petitioners' convictions upon the theory that circumstantial evidence which permits but does not compel an inference of guilt may be made the basis for a finding of guilt despite direct, uncontradicted, unimpeached and reasonable testimony that the fact does not exist.

We believe that that theory is untenable, particularly in support of a conviction in a criminal case. It is contrary to the holding of another Circuit Court of Appeals, and inconsistent with decisions of this Court.

It is for that reason that the petitioners submit that their convictions should be reviewed, and the conflict resolved by this Court.

Conclusion

The petition and record herein present a proper case for the exercise of this Court's discretionary power to review, and we respectfully submit that the writ of certiorari ought to be granted.

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